STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

RECYCLING SERVICES (RSI),	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
THE PEOPLES GAS LIGHT AND COKE COMPANY,	)	**DOCKET NO: 04-0614**
	)	
Respondent.	)	
	)	
Complaint as to Peoples refusing to supply natural gas service as requested by RSI in Chicago, Illinois	)	

POST-HEARING BRIEF OF COMPLAINANT

This complaint involves the Peoples Gas Light and Coke Company's ("Peoples" or "Respondent") refusal to provide gas services to a recycling facility owned and operated by Recycling Services, Inc., ("RSI" or "Complainant") at South California Avenue, Chicago, Illinois. Not until Complainant engaged the formal mechanisms of the Illinois Commerce Commission ("ICC" or the "Commission") were such services, which should have been routine, ultimately supplied.

I. BACKGROUND FACTS

The facts in this matter are largely undisputed and are contained in the Complaint, Exhibits A- I, and Jointly Stipulated Exhibits 1-58. Those facts begin with a March, 2001 RSI request for gas service from Peoples, and Peoples' response welcoming the request for gas and indicating that ample main facilities would be available for the contemplated gas consumption. (Jt. Exs. 1- 4).

The facility RSI was developing on this property is commonly known as a "waste transfer station" which, at hearing, Mr. Koty described as a waste material handling facility where waste (largely construction debris) can be sorted, separated and potentially recycled – thereby diverting a large percentage of the material from a landfill. (Tr. at pp. 50 – 51). RSI's facility is located in a heavily industrial area, at 3152 California Avenue in the City of Chicago, which basically is located at California and the I-55 expressway. The actual property upon which the facility is located is owned by the Metropolitan Water Reclamation District ("MWRD") and, for the purposes of operation of the recycling facility, is leased by Complainant. Both the City of Chicago and MWRD welcomed the project and worked positively with RSI as it was a "high-profile facility within the City" and contributed to the City's positive recycling performance initiatives. (Tr. at pp. 48-49; Tr. at p. 60).

As RSI is a lessee, it has no authority to grant a gas easement to Peoples. Accordingly, as early as September 9, 2001, Mr. Koty advised Peoples that it should contact Susan T. Morakalis, Senior Attorney with MWRD, in order to begin the process of Peoples obtaining an easement in association with the project. (Jt. Ex. 6). Shortly thereafter, on September 13, 2001, follow-up correspondence occurred between Mr. Koty and Jose Gonzales of Peoples. In that correspondence, Mr. Koty attached a copy of a CAD showing the installation conditions at the facility. (Jt. Ex. 8).

Also around this same time, Mr. Koty communicated with Nina Leonard, Peoples' construction specialist. Ms. Leonard quoted Peoples' charge for running a gas line from the street to the actual buildings on the facility site to be $172,300. (Tr. at p. 44). RSI and Peoples then agreed that RSI would contract the installation of the main from the meter to the actual facility, and Peoples' only responsibility would be for the meter and the gas line from the street

to the meter, thus requiring a utility easement pathway approximately 30 foot by 10 foot. (Tr. at p. 44). In December of 2001, Ms. Leonard sent Mr. Koty drawings of the intended meter set up. (Jt. Ex. 11).

The project then went through a construction, permitting and zoning phase, where all necessary building and environmental permits were obtained, and construction begun. On September 9, 2003, Mr. Koty submitted a facsimile letter to John Saigh of Peoples, which pointed out that construction was about to begin, the sewer and water approvals were in place, but that no easement request was ever submitted by Peoples to MWRD. The letter also advised that Mr. Koty had visited the site with Ms. Leonard, and "we indicated the meter location as being positioned behind the open entry gate to the property and that location is still good. Both the sanitary sewer and the new water services will be excavated and installed in the same vicinity so coordination is important." (Jt. Exs. 7, 13).

This communication was followed by two additional facsimiles sent by Mr. Koty to John Saigh, on October 2, 2003, and October 16, 2003, both referencing the need and importance of moving forward with the utility easement. (Jt. Exs. 14, 15).

On October 27, 2003, Mr. Koty once again wrote to Ms. Leonard (Jt. Ex. 18), in an attempt to ascertain information about when the gas line would be installed and to suggest coordination with the installation of water sewer facilities. As Mr. Koty testified:

> At this point, we weren't absolutely sure of some of the more critical design elements... we're getting closer to installation now. So I'm inquiring about operating pressure beyond the meter. Once again, just ask for another detail sheet on the meter to make sure we knew what the meter was dimensionally and that ... the space we were providing was appropriate to the meter, that it would accommodate it well. (Tr. at p. 56).
> * * *
> ...we're working with the City to find paths for sewer and water lines from California Avenue, and we strongly suggest [to Peoples] that you may wish to coordinate the gas installation with all the others. I was concerned with – making

every attempt to avoid redundant costs and to ensure that when all these utilities are brought in from California Avenue, that the timing was somewhat consistent for the sake of construction coordination." (Tr. at pp. 58-59).

In late December 2003, when Peoples still had not contacted MWRD concerning a utility easement, Mr. Koty, feeling a great deal of frustration over Peoples' lack of responsiveness concerning an easement, wrote a letter to Joe Tassone at Peoples, who is in the engineering area at Peoples, requesting that Peoples provide an "absolute date" for an easement agreement with MWRD. The communication notes that the original request for service originated on March 16, 2001 and that, to date, no commitment, entrance sketch or request for easement had been forthcoming. Specifically, Mr. Koty's communication reads:

> Please contact me upon receipt of this fax with an absolute date for your submittal of an easement request to the MWRD for gas service at the above referenced address. Since our site meeting on 11-6-03 I have contact (sic) you several times and you have assured me each time that you will fax me a copy of the entrance sketch. The last time we spoke you indicated that you would submit the easement request and that was two weeks ago. When I called you on the 12-11-03 you promised to call me back in ten minutes and you did not return my call. Our first request for this new service originated on 3-16-01 and as of today's date we still do not have a commitment, an entrance sketch, or an easement request submitted to MWRD. Either respond to this communication on 12-15-03 or refer me to your department supervisor. (Jt. Ex. 19).

As Mr. Koty testified, "I was trying to stimulate a response." (Tr. at p. 58).

On January 8, 2004, Peoples submitted to Ms. Morakalis of Metropolitan Water Reclamation District of Greater Chicago ("MWRD"), obviously without prior discussion with her, a one and one-half page easement document, with the note: "Please have them executed by the Metropolitan Water Reclamation District of Greater Chicago." (Jt. Ex. 20). Not surprisingly, within days thereafter, Ms. Morakalis responded that MWRD utilized its own easement forms and enclosed a copy of the form that it used in granting utility easements. (Jt.

Ex. 21). Peoples was well aware of these MWRD standard easement agreements as they, and other utilities, have entered several of them. (See Complainant Exhibits 1 - 8).

As the project continued to languish yet in February, because of the uncertainty concerning the easement, Mr. Koty contacted Ralph Barbakoff, Peoples' Coordinator of Construction and Design. As Mr. Koty testified, when he was "not able to get anywhere with ... advancing this with the engineering people", he was given the name of Ralph Barbakoff of Peoples as a contact. On February 7, 2004, he wrote the following note to him:

> Following our discussions of 2-4-04 and 2-5-04, we are requesting that you secure copies of all of our correspondence with Joe Tassone, Nina Leonard, and John Saigh from 9-9-03 forward, and familiarize yourself with this project history.
>
> Our initial request for services was forwarded to John Saigh on 3-16-01, and we still do not have a schedule from Peoples Energy. MWRD is awaiting your submittal of their easement agreement, and they are prepared to expedite the issuance of the easement for the gas service. MWRD will issue utility entrance easements only to the utility and not to the tenant who in this case is RSI. We will have construction permits within two weeks. (Jt. Ex. 22).

Later that same month, Mr. Koty again wrote to Mr. Barbakoff:

> Despite repeated phone calls and discussions, we still do not have a written response from Peoples Energy defining your position with respect to our request for a new gas service for Recycling Systems, Inc. at 3152 S. California Ave. We have informed you that the MWRD is the property owner and that the MWRD will only issue an easement for a utility service entrance directly to the utility. We have informed you that the MWRD is willing to review your comments with respect to the easement language provided to you by the MWRD. We have informed you that the MWRD is willing to expedite the issuance of an easement to Peoples Energy which will allow for the installation and maintenance of your facilities as described in your installation exhibit. We have informed you that RSI is willing to pay the easement fee which will be assessed by MWRD. We have informed you that we initially requested this service on 3-16-01. If Peoples Energy does not communicate with MWRD in an attempt to develop an acceptable easement agreement and we do not have a forecast of the service date by the end of February 2004, we will be forced to interpret your continued silence as a refusal to provide the requested service. (Jt. Ex. 23).

Over a month later, on March 23, 2004, Mr. Ralph Barbakoff of Peoples wrote a letter to Mr. Koty concerning the requested easement which, to reiterate, was for a 30 foot by 10 foot piece of ground on MWRD land. The letter, written a full three years after Mr. Koty first advised Peoples they would have to get an easement from MWRD, stated that Peoples had conducted a "limited review" of the MWRD form easement and had identified a "number of significant issues." The letter raises, for the first time, certain issues (such as concern over an environmental clause) and Peoples sets forth the conditions which they suggested RSI meet. Among those conditions: "(T)he agreement must grant a perpetual easement." The letter further states that:

> ...before Peoples Gas devotes additional resources to attempting to fulfill Recycling's request for service, Recycling must agree to pay upfront to Peoples Gas a reasonable sum to cover its legal costs for review and negotiation of the terms of the easement. Of course, payment of legal fees by Recycling would not ensure that the parties would reach agreement on the terms of the easement and therefore would not guarantee that Recycling would ultimately obtain gas service. Rather were Recycling to provide Peoples Gas with legal fees, Peoples Gas would merely agree only to review the agreement and to negotiate in good faith with the MWRD in an effort to reach agreement as to reasonable easement terms.

The letter concludes that RSI should pursue obtaining MWRD's execution of Peoples' easement and that Mr. Koty should contact him "so that we can discuss this further if your client continues to desire Peoples Gas to provide it natural gas service."

Just days later, on April 2, 2004, Ms. Morakalis of MWRD responded to Mr. Barbakoff's letter to Mr. Koty. Ms. Morakalis provided MWRD's comments to Peoples' March 23 letter and indicated that, while Peoples Energy had entered into the MWRD's standard easement form on numerous other occasions, Ms. Morakalis would nonetheless attempt to address the concerns raised by Peoples. Ms. Morakalis also indicated that Peoples should deal directly with MWRD concerning the easement. Moreover, Ms. Morakalis indicated that the

District does not grant perpetual easements, but an easement could be extended after 36 years. She also suggested that she would recommend charging only a nominal easement fee of $10. Concerning the environmental clause, she wrote:

> The intent of the environmental provisions is to set forth the obligations that Peoples Energy is already liable for under the law. The District is not trying to impose any liabilities upon Peoples Energy other than for any acts or omissions caused directly by Peoples Energy or its agents or assigns. Peoples Energy will not be expected to assume liabilities or indemnify the District against acts caused by the District.

On April 6, 2004, Mr. Koty sent a letter to Peoples, reiterating the fact that MWRD was the property owner that must grant the easement and, again, requests that Peoples deal directly and expeditiously with MWRD. (Jt. Ex. 26). The letter also suggests that if any additional delays were encountered, RSI would file a complaint with the Commission.

More than one month later, on May 13, 2004, Elizabeth Ritscherle of McGuire Woods, then counsel for Peoples, responded to Ms. Morakalis' letter – not to Ms. Morakalis, however, but directly to Mr. Koty. The McGuire Woods letter proposes several revisions to MWRD's proposed revised easement and suggests that Peoples would execute an easement if all the suggested changes were incorporated, but, if more negotiations are required, "Peoples will require payment of its attorney's fees in accordance with Peoples Gas' letter dated March 23, 2003. (Jt. Ex. 28).

Ms. Morakalis responded quickly and directly to the above-referenced Peoples' letter. In her May 25, 2004 response, she agreed to those changes requested by Peoples that she believed were in her authority to accept without going to a full District vote of the Board of Directors and that were protective of the public and the land owned by the District. (Jt. Ex. 29). Ms. Morakalis also expressed her observation that Peoples' position in these easement discussions was "grossly inconsistent" with the standard agreements entered into routinely between Peoples Gas and the

MWRD. She also objects to the position Peoples Gas is taking regarding MWRD easements in this instance, since it has entered several other identical easements, but apparently is drawing a distinction because this one will only serve a single customer. In sum, on behalf of the MWRD, she states:

> In view of all of the above, we respectfully submit that we find no legitimate or reasonable access or economic issue that would serve as an impediment to services being delivered to the subject parcel and believe that Peoples Gas' position is contrary to the longstanding understanding between the parties.

On June 17, 2004, Ritscherle of McGuire Woods responded to Morakalis' May 25, 2004 letter – again, directly to John Koty, not to Ms. Morakalis. (Jt. Ex. 30). The letter raises several more objections to certain sections of the proposed easement, particularly those dealing with the standard environmental clause found at Section 9 of the standard easement agreement. It observes that "(W)hile Peoples has entered into easements with the MWRD in connection with installing large diameter transmission or distribution lines, the terms of those easement agreements are not relevant here because they reflect a very different use of the property by Peoples." The letter concludes that "it continues to be Peoples' position that RSI is not affording it reasonable access to provide gas service."

On June 23, 2004, Morakalis of MWRD responded directly to the June 17, 2004 McGuire Woods letter. (Jt. Ex. 31). The response begins by asserting that the environmental clause contained in the easement imposes liability based solely on the actions of and conditions created by Peoples in its operation of the gas pipe within the subject easement. It further notes that the clause is a standard condition found in all MWRD utility easements and simply reflects standard environmental law. The letter then reflects MWRD's belief that Peoples did not find the terms of prior easements germane to the instant situation, because Peoples had not entered into

any prior easements to serve a single customer. Specifically, on behalf of the MWRD, Ms. Morakalis stated:

> The District currently does not distinguish between easements that serve multiple customers or only one customer. Rather, the District looks at a transaction in terms of whether a utility company will enter its land to install utilities. This last point raised in your June 17,2004 letter illustrates how Peoples is basing its decisions in this instant matter on the economics of the transaction and not actually on whether reasonable access is being granted.
>
> It is relevant to note that this gas service request has been outstanding for approximately three years. The District has preliminarily approved Peoples' easement request and is prepared to present this matter to its Board of Commissioners for final approval to grant the easement to Peoples at its July 15, 2004 meeting. This matter will be put on the July 15,2004 agenda by July 1, 2004. If you have any further concerns regarding the easement, please respond hereto prior to that date.

On July 2, 2004, Ritscherle of McGuire Woods again responded to MWRD's letter – again, directly to Mr. Koty and not to Ms. Morakalis. This third McGuire Woods letter asserted that Peoples would not enter into an easement agreement that contained the environmental terms and conditions contained in the MWRD easement, stating that such terms "are not tailored to a gas service easement." (Jt. Ex. 33).

On July 6, 2004, Ms. Morakalis from MWRD responded, via email, directly to Ritscherle of McGuire Woods. Ms. Morakalis inquired about the specific objections to the environmental provisions and, further, questioned Peoples continued course of conduct in channeling communications through Mr. Koty instead of directly to the MWRD. (Jt. Ex. 34). As Ms. Morakalis suggested, this approach was "baffling" given the fact that Mr. Koty had no relationship with the MWRD and could not grant Peoples an easement for gas service on behalf of RSI, who was simply a tenant on MWRD property. Moreover, such position had been reiterated to Peoples at various times throughout the parties' continued correspondence.

On July 8, 2004, Ritscherle of McGuire Woods responded – this time directly to Ms. Morakalis. (Jt. Ex. 35). As to why she continued to communicate with Mr. Koty instead of the MWRD, Ritcherle suggested: "While it may seem odd to you that I am replying to someone other than the District, from Peoples' perspective, access to provide gas service should be, and typically is, negotiated with the prospective customer, not a third party. Therefore, it is Peoples practice to correspond directly with the prospective customer." Peoples' counsel then suggested, in essence, that Peoples has provided all the comments it intends to and "if RSI would like to discuss or negotiate this matter further, it should contact Peoples directly to make arrangements to pay the reasonable attorney's fees associated therewith."

On July 15, 2004, MWRD's Board of Commissioners approved the issuance of an easement to Peoples that reflected MWRD's standard Easement Agreement, with various changes made in response to specific concerns raised by Peoples. (Jt. Exs. 37, 40). Also on July 15, 2004, Ms. Morakalis forwarded the MWRD approved Easement Agreement to Ritscherle of McGuire Woods for Peoples' execution. (Jt. Ex. 38). At the same time, Mr. Koty contacted Anita Brent of the Illinois Commerce Commission and proceeded with an informal complaint. (Jt. Ex. 39).

Over a month later, on August 30, 2004, Peoples responded to the informal complaint. The response takes the position that RSI has not provided Peoples reasonable access because Peoples Gas is unwilling to accept MWRD's standard easement for a small gas service. Specifically, Peoples asserted to the Commission: "Peoples Gas has made a good faith effort to negotiate the terms of such an easement with the District, working from the District's form easement agreement, which contains terms that Peoples Gas is unwilling to accept in connection with installing a small diameter gas service." It continues with the position that MWRD has not

agreed to modify its easement sufficiently to provide what Peoples would consider to be "reasonable access." (Jt. Ex. 43).

During the time Peoples claimed RSI could not provide service because RSI was not granting it "reasonable access," RSI had to move forward with construction while under the untenable position of uncertainty concerning utility service. As Mr. Koty (who has years of experience in designing, consulting and contracting industrial projects) testified, he has worked with utility companies many times before, particularly NICOR, and the easement process generally takes about six (6) months. Never had he experienced anything "of this magnitude". (Tr. at p. 93).

While Peoples was refusing to execute an MWRD easement on its claim of no reasonable access, Mr. Koty had to move forward with various construction-related items. One of those items was the installation of the other utilities, such as electric, sewer and water. Construction delays and uncertainties added to changed schedules and extra costs. In the Fall, alternative fuel arrangements had to be made to accommodate construction needs. Further, because Peoples was unresponsive during the first pressure test, the pressure had to be tested twice. Even an informal complaint before the ICC did not move Peoples. Rather, Peoples' callous response openly suggests that, given that the easement would be for a single service user, MWRD's easement was simply not worth the trouble.

II. PROCEDURAL BACKGROUND

The original formal Complaint in this matter was filed on October 8, 2004, and an Amended Verified Complaint followed on October 22, 2004. Shortly thereafter, Complainant also filed a Motion for Expedited Hearing and Decision Concerning Gas Service. On November 15, 2004, with an expedited Commission hearing looming, Peoples executed MWRD's standard easement agreement, with minor modifications made by Ms. Morakalis in response to the

concerns raised. On January 26, 2005, three years, ten months and ten days after it was first requested, gas service was supplied to RSI's facility on California Avenue.

Once the gas service was installed, Respondent filed a Motion for Summary Judgment, essentially arguing that the case should be dismissed because gas service had been installed, and the Commission no longer has any authority over the matter. In particular, the Respondent argued against Complainant's request to be made whole, pursuant to Section 5-201 of the Act. Respondent's point is that the Commission cannot award damages pursuant to that Section. While the Administrative Law Judge agreed with that point, he allowed the case to move forward on the question of whether Peoples' actions in this matter violated the Public Utility Act. At hearing, Complainant indicated that it intended to argue the question of the Commission's authority to recompense Complainant under Section 5-201 to the full Commission. The Administrative Law Judge indicated that the Commission's rules allowed the Complainant to do so. (Tr. at p. 26). Thus, this brief incorporates the arguments made to the Administrative Law Judge concerning the Commission's authority under Section 5-201.

The Complaint was filed pursuant to Section 10-108 of the Act, which permits any person or corporation, chamber of commerce, board of trade, or any industrial, commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation to file a petition or complaint setting forth any act or things done or omitted to be done in violation of any provision of the Act. 220 ILCS 5/10-108.

The Complaint alleged that Peoples had not complied with Section 8-101 of the Act, which provides, among other requirements, that "(e)very public utility shall, upon reasonable notice, furnish to all persons who may apply therefore and be reasonably entitled thereto, suitable facilities and service, without discrimination and without delay." 220 ILCS 5/8-101. The

Complaint further alleges that Section 8-401 of the Act provides that "(e)very public utility subject to this Act shall provide service and facilities which are in all respects adequate, efficient, reliable and environmentally safe." 220 ILCS 5/8-401. At hearing, the Complainant also asserted a violation of Section 9-241 of the Act which provides that "no public utility shall establish or maintain any unreasonable difference as to rates or other charges, services, facilities or in any respect . . . as between classes of service." 220 ILCS 5/9-241.

Finally, the Complaint alleged that Section 5-201 of the Act provides that the public utility is liable to a corporation for losses, damages or injury suffered in any case where the public utility "shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done either by any provisions of this Act or any rule, regulation, order or decision of the Commission", including attorneys fees and that where such act or failure to act is willful, punitive damages may be awarded. 220 ILCS 5/5-201.

The Complaint concluded by requesting various forms of relief including: (1) an Order requiring Respondent to provide gas service to Complainant immediately; (2) an Order making Complainant whole for the wrongful acts of Respondent, by awarding: (a) the additional construction costs and alternative fuel and equipment costs necessitated by the delays Peoples caused herein; (b) the consulting fees necessary to pursue the execution of an easement between MWRD and Peoples; and (c) the attorneys fees necessary to bring this action, as well as such other relief as the Commission deemed warranted and just as a deterrent for this violation of the Act and any similar violations.

A hearing was held in this matter on April 12, 2005. A Hearing's Notice also established a schedule for the filing of briefs, reply briefs and draft orders. Finally, a joint stipulation relating

to various documents and facts that were to be placed in the record in this matter was filed with the Commission on April 25, 2005.

III. RELEVANT PROVISIONS – (See Attachment A)

Section 4-101 of the Act provides that the Commission shall have general supervision of all public utilities, shall inquire into the management of the business thereof and keep informed, among other issues, as to the manner in which their plants, equipment and other property owned, leased, controlled or operated are managed, conducted and operated not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with the Act and any other law, with the orders of the Commission and with the charter and franchise requirements. 220 ILCS 5/4-101.

Section 9-241 of the Act provides that "no public utility shall establish or maintain any unreasonable difference as to rates or other charges, services, facilities or in any respect . . . as between classes of service." 220 ILCS 5/9-241.

Section 4-201 of the Act provides that the Commission shall see that the provisions of the Public Utilities Act are enforced and obeyed. 220 ILCS 5/4-201. Section 8-101 of the Act provides, among other requirements, that "(e)very public utility shall, upon reasonable notice, furnish to all persons who may apply therefore and be reasonably entitled thereto, suitable facilities and service, without discrimination and without delay." 220 ILCS 5/8-101.

Section 5-201 provides that any utility violating or failing to comply with any stricture of the Act shall be liable for all loss, damages or injury caused or resulting therefrom, and, if found to have acted willfully or wantonly in the violation, subject to punitive damages. The utility must also pay attorney's fees in the event of a recovery of any kind under Section 5-201. 220 ILCS 5/5-201.

IV. ARGUMENT

This case is not about power outages or disruptions; neither is it about damages for negligence in the provision of service. It is about Peoples' refusal to provide service to a customer who has a statutory and regulatory right to such service. While Peoples argues that the refusal was warranted because the customer (RSI) has not provided "reasonable access", the facts clearly demonstrate that such argument is mere "pretext" and, thus, should not be tolerated by the Commission.

Moreover, Peoples' refusal continued until the formal mechanisms of the Commission were engaged – at a substantial and unnecessary cost to RSI. While the Commission's informal complaint mechanism is designed to expeditiously and freely allow utilities to solve customer complaints of violation, even this informal mechanism did not move Peoples into acting in a manner consistent with its obligations under the Public Utilities Act (the "Act").

Those obligations are simple and straightforward. First, Section 8-101 of the Act requires a regulated public utility, here Peoples, upon reasonable notice, to furnish to those reasonably entitled to service, suitable service "without discrimination and without delay". 220 ILCS 5/9-101. There is no question that RSI was and is entitled to service. That was evident as early as March of 2001 when Peoples sent RSI their commitment of service letter. The sole and only reason the question of service languished and became uncertain and delayed was because Peoples took the position that it was not going to enter into MWRD's standard easement agreement for the benefit of a single user.

That position is reiterated throughout the record. As a large and responsible government service entity, MWRD, which owns a substantial amount of property in the Chicago-land area, has developed a standard utility easement agreement which it has authorized to be used for all utility easements on MWRD property. While Peoples had previously entered into the very

easement agreement to which it here conjures up the "reasonable access" argument, it draws a distinction based purely on economics – leaving RSI to fend for itself. In other words, while Peoples executed the very same easement agreements for MWRD property that contains multiple gas and transmission mains to serve multiple People customers, Peoples refused to sign the very same easement to provide service to RSI. Such distinctions constitute discrimination in violation of Section 8-101 and, as well Section 9-241, which provides that "no public utility shall establish or maintain any unreasonable difference as to rates or other charges, services, facilities or in any respect . . . as between classes of service". Here, Peoples draws an unlawful distinction between service to RSI and service to multiple other customers. This distinction inappropriately results in higher costs to RSI in pursuing such service than to those served by the multiple gas mains on other MWRD property.

The Commission was created, by statute, to oversee regulated entities. One of the inevitable keystones of that oversight is to ensure that such entities act consistent with their obligations under the Public Utilities Act and the regulations adopted by the Commission. Where a regulated utility's actions are not consistent with the Act, the Commission has the authority (indeed, obligation) to act in a manner which requires future compliance with the Act. Thus, Court's have held that a Commission is empowered to discipline a utility and that, in doing so, the Commission can act independently – apart from a rate proceeding. *Citizens for a Better Environment v. Illinois Commerce Commission*, 103 Ill.App.3d 133, 430 N.E.2d 684, 58 Ill. Dec. 652 (4th Dist. 1981). Indeed, if the Commission was not so empowered to act, how could it ever meet its obligation to ensure that regulated entities adhere to the law the Commission is empowered to apply and administer?

Obviously, Peoples' arguments will serve to limit the Commission's oversight authority. Nonetheless, at the urging of this very respondent, in *Peoples Gas Light and Coke Co. v. Illinois Commerce Commission*, 222 Ill.App.3d, 584 N.E.2d 341, 165 Ill. Dec. 162 (1st Dist. 1991), the First District Appellate Court declared that the Commission's role and jurisdiction is broader than what the Commission in that case exercised. In that case, the Commission determined that it was without jurisdiction to require billing to the spouse of a customer of record. The court, agreeing with Peoples, held that the Commission had broad authority under Section 4-201 of the Act to require adherence to the Act and to other laws. Thus, where it is in Peoples' best economic interest to argue a more expansive role of the Commission, it has done so. Here, however, its interests are best served by arguing limitations to that authority.

In this case, there are two basic premises behind RSI's Complaint, both of which the Commission can, and should, act favorably upon. First, the Commission should find that Peoples' actions violated Sections 8-101 and 9-241 of the Act. Second, the Commission should order that RSI be recompensed for the unnecessary expenses it incurred as a result of Peoples unreasonable delay and for the costs it was forced to incur to get Peoples to do that which it is lawfully required to do under the Act - to provide service without discrimination and without delay.

A. Violation

It is well-established that supervision of service, as well as supervision of rates, are the pronounced responsibility of the Commission. *City of Alton v. Commerce Commission*, 165 N.E.2d 513 (1960) and *Village of Apple River v. Illinois Commerce Commission*, 165 N.E.2d 329 (1960). Certainly, the Commission has the authority to declare that Peoples' actions, in its refusal and delay in providing service to RSI, violated the Act. In order to preserve the proper

balance between the rights of the utility and the right of the consumer (here a small business owner), as the Commission is obligated to do, the finding of a violation is imperative.

Peoples' actions here can only be seen as an arrogant and inexcusable attempt to avoid its responsibilities under the Act. Even the informal ICC process did not move it to provide service. Based upon the record evidence, it is not a far stretch to argue that had RSI not hired the undersigned counsel and filed the instant formal Complaint engaging the auspices of the Commission, it may not have gas service today.

While Peoples will no doubt attempt various defenses to excuse its recalcitrant conduct, any such defenses fail and belie the record evidence. It is what it is: a less than transparent avoidance of its responsibility to serve – by a self-proclaimed determination that the service was not worth the trouble. However, since Peoples is well aware that such determinations are not its to make under the Act, it has manufactured various defenses for its action, all of which fail. At its core, however, is the actual position Peoples took in the Commission's informal complaint process: "Peoples Gas has made a good faith effort to negotiate terms of such an easement with the District working from the District's form easement, which contains terms that Peoples Gas is unwilling to accept in connection with installing a small diameter gas service." Since Peoples is unwilling to accept those terms in order to provide service to RSI, Peoples considers that RSI has not granted it reasonable access. (Jt. Ex. 43).

There are several basic fallacies with this "reasonable access" defense, which is, in a nutshell, mere pretext (Black's Law Dictionary defines "pretext" as "ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive"). First, to the extent Peoples tariff requires "reasonable access" in its contemplated sense of usage, such access has indeed always been afforded. There is absolutely no impediment, alleged or demonstrated, that

would allow for a conclusion that Peoples cannot access the property at any time to check its meter, and, if necessary, to access the 10' x 30' easement pathway to provide service to its gas main. Peoples' access argument has nothing to do with access in its traditional sense, however, but rather has everything to do with its refusal to sign MWRD's form easement, which it considers onerous. Yet, within this standard easement, MWRD made every concession conceivable to accommodate Peoples' demands and still Peoples refused to execute it. Importantly, it reduced its easement fees to $10 annually. There is simply nothing contained within the four corners of the MWRD easement document (of which thousands have been executed) that does not give Peoples "reasonable access".

While Peoples appears to self define "reasonable use" in terms of alleged restrictions placed on it by MWRD's standard easement, the law defines "reasonable use" *vis a vis* easements as "no interference with the reasonable use of the easement as a passageway". *Peoples Gas Light and Coke, et al.*, 250 Ill.App. 357 (1st Dist. 1930). See also, *Central Illinois Public Service Company v. Davis*, 85 Ill.App.3d 496 (5th Dist. 1980). In *Peoples*, the court refused to enjoin a property owner from erecting a building over an easement it held for gas mains. In this case, MWRD even readily agreed to a provision which restricted the construction of any a building over the 10' x 30' easement, although no such building was ever even contemplated.

Peoples' assertions to the Commission, in its response to RSI's informal complaint, that it negotiated "in good faith" with MWRD fall short of reality - and speak volumes regarding its actual motivation. Good faith implies fair dealing, and, importantly, a desire to reach accord. In this case, it is obvious that as soon as Peoples knew the land was owned by MWRD (in the Fall of 2001), Peoples refused to deal with MWRD. Not until early 2004 did it even bother to contact

MWRD. Even then, Peoples simply transferred its "standard" one and one-half page easement agreement to MWRD, knowing full well MWRD would not accept it. While all the other utilities involved in the RSI project signed the MWRD easement, Peoples quit dealing with the MWRD as soon as it received the MWRD standard easement. Uncannily, it even requested that RSI pay its McGuire Woods attorneys' fees in order to pursue discussions with MWRD concerning their easement. Certainly, it is not good faith to suggest, as Peoples did here: mine or yours and, if not mine, yours will cost.

Good faith also implies that negotiations take place between those in authority to reach agreement. That Peoples continued to deal with RSI on the question of easement, under the pretext that they were the customers, as opposed to the landowner who is the only entity with the legal authority to grant the easement itself smacks of bad faith, delay and an intention not to reach agreement. Certainly, if providing new service to a large high-rise apartment building in Chicago, Peoples would not deal directly with the individual apartment tenants. Rather it would obviously deal with the landowner or his developer or agent – those in authority to actually grant Peoples' legal access to the service main and common meter. (Neither, hopefully, would they ask the tenants to pay their attorneys' fees to deal with the landowner or developer.) The RSI situation is no more unique than that hypothetical, except that there is only one actual tenant and the landowner just happens to be a responsible government entity with a standard easement agreement.

The real distinction, from Peoples admitted perspective, is that since there is only one service to be provided, it is hardly worth Peoples' trouble to deal with MWRD. That, however, is an economic decision and is not recognized under the Act or defensible under Peoples' tariff. It is, in fact, a distinction which violates the Public Utilities Act. Most certainly it was a

"business decision" not to enter into MWRD's standard easement agreement for the RSI property. (See Tr. at pp. 199-200).

Finally, good faith implies that all items of concern are laid out to the proper parties so that each and every items of concern can be expeditiously dealt with. Here, Peoples' refusal to deal directly with MWRD allowed a red herring to be developed and exploited concerning the standard easement's environmental clause. Peoples' Steve Matuszak testified at hearing that, as he read the clause, Peoples may somehow be required to conduct Phase I and Phase II environmental audits and potentially even be required to clean up the property (the 10' x 30' easement) to higher background levels than currently exists. Mr. Matuszak is not an attorney, and he is certainly not an environmental or land use attorney.

First, the easement agreement does not transfer ownership rights. It only transfers rights to use and access the property. Second, it was and has always been MWRD's position that the clause only requires Peoples to follow whatever environmental laws currently apply and to assume liability only for whatever environmental harm might be caused as a proximate result of Peoples' exercise of the easement. Ms. Morakalis' letter of April 2, 2004 should have readily put this issue to rest. There she indicated:

> The intent of the environmental provisions is to set forth the obligations that Peoples Energy is already liable for under the law. The District is not trying to impose any liabilities upon Peoples Energy other than for any acts or omissions caused directly by Peoples Energy or its agents or assigns. Peoples Energy will not be expected to assume liabilities or indemnify the District against acts caused by the District.

Further, whether the standard easement language included "natural gas" as a hazardous waste or not is irrelevant to that intention, and, as Ms. Morakalis testified, she had no problem removing it once Peoples directly made it an issue.

In any event, regardless of any inclusion of natural gas in a list of hazardous materials in the environmental clause, any release of this gas in a way that damages the environment could and should be the responsibility of Peoples, not the landowner who has allowed the natural gas main to cross its ground. That should be axiomatic in all of Peoples' easements. Certainly they do not expect to transfer liability for their product to the landowner whose land they cross. Thus, MWRD's environmental clause is simply, as Ms. Morakalis testified, a tool to ensure MWRD is a good steward of the land for the citizens for Cook County. The Commerce Commission, as a public watchdog itself, should have a great deal of appreciation for that concept.

Thus, while Peoples attempts to posture this case as a denial of "reasonable access" because they couldn't, despite their good faith efforts, negotiate an acceptable easement agreement with MWRD, such attempts belie the facts. Rather, had Peoples simply accepted the MWRD easement (or dealt with them directly about any real issues) as it has done in the past and as the other utilities on the project did, RSI would not have had time to incur the costs it did to get Peoples to finally provide service. Ms. Morakalis and Mr. Koty both testified that the process generally takes 3-6 months and that this situation was highly unusual. Indeed, Peoples' position, as it was taken in response to the Commission's informal complaint, appears to be that they are actually denying service because they could not, in "good faith", reach an agreement with the MWRD. Ultimately, however, when challenged with the formal mechanisms of the Commission, Peoples balked, provided service and signed a version of the MWRD standard easement which Ms. Morakalis considers substantially similar to their standard easement agreement.

The actions of Peoples' here have constituted both a delay in providing service, and, constructively, a denial of service to which RSI is statutorily entitled. The reasons for such are

not cognizable under the Public Utilities Act because they are based on "economic distinctions" not cognizable under the Act or defensible under Peoples' tariff. Peoples' "reasonable access" theory is mere pretext. Thus, the Commission should find that Peoples' actions herein violate Sections 8-101 and 9-241 of the Act.

B. Remedy

To allow Respondent's actions to go unchecked by the Commission would be tantamount to giving Peoples a pass for their outrageous and arrogant conduct in this matter. The position they have placed an Illinois consumer in here is untenable and should not be tolerated by the body charged with overseeing Peoples' responsibility to the public they serve. It is, in fact, the "public" in the "public" utility nomenclature that is at risk here if the Commission does not act in a fashion that stops this type of behavior on the part of "public" utilities.

This public utility will, of course, argue that, since the gas service is now in place, the matter is over and the Commission no longer has any authority. It has made that argument already in a Motion for Summary Judgment. While the Administrative Law Judge ruled that the Commission is precluded from awarding damages to RSI, he declined to dismiss the matter, finding that the Commission had jurisdiction to hear the questions of violation.

The Commission, as an administrative agency, draws its authority from the Act. However, when applying that Act to perform its specific duties "an administrative agency has wide latitude to accomplish its responsibilities." *Freedom Oil v. Illinois Pollution Control Board,* 275 Ill.App.3d 508, 655 N.E.2d 1184, 211 Ill.Dec. 801 (4th Dist. 1995). RSI submits that the Commission has the authority and the responsibility to find the violation and award a remedy in the nature of recompense for that violation. Certainly, what kind of administrative and regulatory oversight is it that allows for a finding of violation – but no remedy for that violation?

Rather, RSI postures that this matter is well within the authority and auspices of the Commission, and, as such, the Commission should read its authority consistent with its jurisdiction and responsibility. While recognizing that the Commission is a creature of statute, Illinois courts have ruled that "an express grant of power or duty to an agency or one of its officers carries with it the grant of power to do all things that are reasonably necessary to execute that power or duty. *Wilson v. Department of Professional Regulation*, 317 Ill.App.3d 57, 739 N.E.2d 57, 250 Ill.Dec. 596 (1st Dist. 2000), citing *Lake Co. Board of Review v. Property Tax Appeal Board*, 119 Ill.2d 419, 427, 519 N.E.2d 459, 116 Ill. Dec. 567 (1988). Regarding statutory objectives, "administrative agencies have both express and implied powers to do all that is reasonably necessary to accomplish statutory objectives, and not every agency power must be explicitly articulated in the governing statute. *Ikpoh v. Dept. of Prof. Regulations*, 338 Ill.App.3d 918, 927, 789 N.E.2d 442, 449, 273 Ill.Dec. 542, 549, citing *Wilson v. Department of Professional Regulation*, 317 Ill.App.3d 57, 63-64, 739 N.E.2d 57, 61-62, 250 Ill.Dec. 596, 739 (1st Dist. 2000). Here, the Commission should exercise that power.

RSI recognizes that Peoples will argue cases for its proposition that the Commission is without authority to order it to do anything but order that the service be provided. (*Barry* v. *Commonwealth Edison Company*, 374 Ill. 473, 29 N.E.2d 1014 (1940) and two 20 year old First District appellate court cases. *Ferndale Heights Utility Company* v. *Illinois Commerce Commission*, 112 Ill.App.3d 175, 445 N.E.2d 334 (1st Dist., 1982) and *Moenning* v. *Illinois Bell Telephone Company*, 139 Ill.App.3d 52, 487 N.E.2d 980 (1st Dist. 1985).

However, none of those three cases are on point, and none concern or address the key provision in question here: Section 5-201 of the Illinois Public Utility Act. 220 ILCS 5/5-201.

That section clearly declares that damages, including attorneys' fees, are appropriate where a utility violates the Act, by its wrongful act or omission:

> "(I)n case any public utility shall do, cause to be done or permit to be done by act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done either by any provisions of this Act or any rule, regulation, order or decision of the Commission, issued under authority of this Act, the public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom...." 220 ILCS 5/5-201.

While Peoples does not cite the above-referenced language, it nonetheless argues that the Commission is without authority to do that which the above-referenced language provides.

RSI disagrees that the Commission is without authority to order reparations or recompense to those who are adversely impacted by a utility's violation of the Act, and requests that the Commission look to the language of the Act, as well as the purpose for which the Commission is created, and determine, consistent therewith, that the Commission possesses the power and authority inherent in the Act to apply Section 5-201 to the instant circumstances.

Peoples has argued that a "careful reading" of Section 5-201 "makes it quite clear that the Commission lacks statutory authority to award damages to Complainant". RSI speculates that Peoples must believe that, since this provision speaks to circuit court action, the Commission is legislatively foreclosed from exercising any authority whatsoever under this language. Such serves only to limit the role of the Commission – and restrict it in its responsibility, indeed its mandate, to oversee the effective provision of utility services in Illinois and to hold Illinois utilities to the letter and spirit of the law. While the circuit court may be the court of first resort under 5-201 when the complaint is for tortious negligence, such as that claimed during a power outage, here we are not dealing with negligence but rather an allegation of an enforceable regulatory and statutory violation. Certainly, given the broad mandate of Section 5-201, the

entity charged with enforcing the statute can fashion a remedy order that punishes the utility for its violation. In this case, that punishment would entail recompensing RSI for its costs resulting from delayed service and its cost to pursue service and this action.

The courts have not construed the Commission's authority restrictively. Indeed, at the urging of this very Respondent, in an entirely different case, but one much later than those Peoples cites in its Motion, the court determined that the Commission had jurisdiction to determine the utility's right under the Marriage and Dissolution of Marriage Act to bill a spouse for outstanding gas bills. In doing so, the court reversed the Commission order which had determined that the relevant family law statute "creates a right to sue in the civil courts, and it is beyond our jurisdiction to determine a customer's liability under that Act." *Peoples Gas Light and Coke Company* v. *Illinois Commerce Commission*, 222 Ill.App.3d 738, 584 N.E.2d 341 at 343, 165 Ill.Dec. 162 (1st Dist. 1991). Recognizing that the Commission derives its power and authority from the Public Utilities Act, the court cited Section 4-201 of the Act:

> "It is hereby made the duty of the Commission to see that the provisions of the Constitution and statutes of this State affecting utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed." 220 ILCS 5/4-201.

While the Commission in that case maintained that it did not have jurisdiction to determine Peoples' rights under the family law statute at issue, the court unequivocally found that the Commission had the necessary jurisdiction pursuant to this section ("we find no ambiguity in Section 4-201 of the Public Utility Act which provides the Commission with the jurisdiction at issue.")

While this case did not involve the Commission's jurisdiction to make a complainant whole for a utility's violation of the Act, as the instant one does, a more recent First District appellate court case, authored by appellate judge and former legislator Allan Grieman, provides a

timelier, post-deregulation insight into the court's view of the Commission's general and specific jurisdiction. See *Wernikoff v. RCN Telecom Services of Illinois*, 791 N.E.2d 1195 (1st Dist. 2003).

In considering the issue of whether the trial court could exercise jurisdiction over customer claims of reparation under the Act, or whether the Commission had exclusive jurisdiction over such claims, the court in *Wernikoff* took the opportunity to review the Commission's statutory role, as well as Section 5-201. The court took cognizance of the Commission's role in hearing complaints concerning violations of the Act:

> "By way of background, we note that the Act is quite explicit on the scope of consumer complaints the Commission has jurisdiction to hear:
>
> > "Complaint may be made by the Commission, of its own motion or by any person or corporation * * * setting forth any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the Commission. 220 ILCS 5/10-108.
>
> Thus, consumers can file complaints with the Commission only if there is a violation of the Act or of an order or rule of the commission. However, the Commission has no jurisdiction over consumer complaints that involve common law claims of violations of statutes other than the Act. *Wernikoff*, 791 N.E.2d 1195 at 1199.

While recognizing that circuit courts, not the Commission, has jurisdiction over consumer complaints that involve common law claims of violations of statutes other than the Act (including, presumably those that sound in tort) where the claim arises from violations of the Act, as here, the court presumed the Commission had jurisdiction. This case is not a complaint for damages as a result of a negligent utility who has caused damages. This is a complaint for recompense for the costs wrongly incurred as a result of a violation of the Act and in pursuit of a remedial order.

In fact, in *Wernikoff*, the court specifically examined Section 5-201 of the Act, and declared that it was the only provision of the Act that "speaks to jurisdiction" and, as is clear from the language of the courts' opinion, court jurisdiction under Section 5-201 is not exclusive but rather co-exists with that of the Commission where the issue involves a violation of the Act. That Section 5-201 uses the word "may" instead of "shall" in its final sentence confirms the analysis that, where a violation of the Act is alleged and determined, either the Commission (pursuant to its statutory authority) or the court (pursuant to the specific language of Section 5-201) may award a remedy consistent with the Act.

Peoples will conveniently ignore the actual language of Section 5-201, especially its clear admonition that those who violate the Act will be held accountable, and are to be liable to affected consumers and companies for such violations. Instead, it will seek a ruling that would dismiss the complaint, which RSI had every right to file, on the basis that even if the utility violated the Act, the Commission has no authority to require it to assume responsibility for such violation – by making RSI whole for the economic losses it suffered as a result of the violation. Further, Peoples does not articulate its position regarding circuit court jurisdiction to hear this complaint and, in fact, had RSI filed this matter initially in circuit court, it is quite likely that Peoples would have argued that a formal complaint needed to first be filed with the Commission, and a finding of violation made administratively, prior to the court entertaining arguments concerning damages.

Such position puts RSI is in a Catch-22 -- a position that no consumer ought to find itself in pursuant to the Public Utility Act. Surely, the Act does not require a consumer to seek relief in both forums in order to be made whole for any violations of the Act. Conversely, though, how is the circuit court specifically equipped, as is the Commission, to ascertain whether a utility

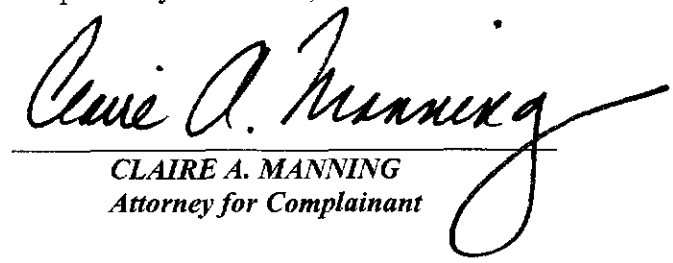
violated Section 8-101 of the Act because of its "unreasonable delay" or based upon Peoples' manufactured "reasonable access" theory? Thus, RSI's complaint (which started at the Commission's informal stage) was correctly first filed with the Commission. Thus, in the interests of justice under the Act, RSI should be properly recompensed for the economic loss it suffered in pursuit of enforcing the act and securing gas services.

RSI respectfully requests that the Commission consider the Act, and its broad authority thereunder, as contained in Sections 4-201, 10-208 and 5-201. Section 10-208 provides the Commission with the ability to hear violations of the Act, and Section 5-201 provides that those who violate the Act are liable to those who are adversely affected by the violation. Reading one without the other is tantamount to providing a right without any real remedy. Surely, the legislature did not intend such result. Section 4-201 provides broad authority for the Commission to effectuate the purposes of the Act, which is enhanced, not abrogated, by Sections 10-208 and 5-201. These provisions should not be read in isolation, but rather should be read consistent with the purposes of the Act and the legislative intention behind the creation of the Commission and the important role it has in regulating public utilities in Illinois.

V. CONCLUSION

For all of the above stated reasons, RSI respectfully requests that the Commission find Peoples in violation and recompense RSI for the costs of delay in service, as well as the costs of pursuing service and adherence to the Act.

Respectfully submitted,



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Proof of Service

The undersigned hereby certifies that a copy of the foregoing ***Post-Hearing Brief of Complainant*** was served upon:

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and/or by enclosing the same in an envelope addressed to such attorney at his/her address as disclosed by the pleadings of record herein, with postage prepaid, and by depositing said envelope in a U.S. Post Office Box in Springfield, Illinois, on this 3rd day of ***June, 2005***.